In the Supreme Court of the United States.

No. 14. ORIGINAL. OCTOBER TERM, 1904.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF FOR A WRIT OF HABEAS CORPUS.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

When Indians who have received allotments become citizens of the United States and subject to the laws of the State.

As pointed out in the Government's original brief (pp. 19, 20), it is not clear from the act of February 8, 1887, when Congress intended citizenship of the United States and subjection to State legislation to attach in the case of Indians receiving allotments thereunder. Assuming, however, for the sake of argument—for otherwise the petitioner's plea that there can be no divided jurisdiction over the Indian would have no support whatever—that those consequences attached upon the receipt of the first patent by allottees, I endeavored to show that such fact was not inconsistent with the power exercised by Congress in the act of January 30, 1897, to regulate the liquor traffic with them.

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But, as stated upon the argument, nothing was intended to be conceded upon the point in question. On the contrary, the Government contends that if this court should be of the opinion that Congress could not constitutionally regulate trade and commerce with Indian allottees after they had become citizens of the United States and subject to the laws of the State in which they reside, it necessarily follows that the assumption that those consequences attached when an allottee receives his first patent under the act of 1887 is incorrect and must be abandoned.

The act of 1897 must be taken as a legislative interpretation of the act of 1887; and as the act of 1897 plainly shows that Congress regarded Indians who had received allotments of lands in severalty as being under its protection while the title to such allotments was held in trust for them by the Government, the act of 1887 must be given such construction as will make it accord with that view. In other words, the relations of the United States with the Indians being, as this court has repeatedly held, a political matter, for the determination of Congress alone, the courts, where the intention of Congress in defining those relations in a particular act is doubtful, will accept and follow the construction which Congress may, in a later act, put upon its prior legislation; *a fortiori*, when a different construction would render the later act unconstitutional. The principle of a legislative construction of a prior act has been recently restated and approved. (*Johnson* v. *Southern Pacific Company*, decided December 19, 1904, and authorities cited.)

The act of 1887 provides (sec. 6) that "upon the *completion* of said allotments *and the patenting* of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the State or Territory in which they may reside."

Were it not for the fact that every court that has considered this language at all has assumed it to mean that an Indian becomes entitled to the benefit of and subject to the laws of the State in which he resides upon the receipt of his first patent, the natural inference would be that Congress intended those consequences to attach only when the allotments referred to had been fully completed and the final patent issued. But in spite of the array of cases upon this subject, it will be found, upon examination, that in none of them was the provision referred to carefully analyzed and discussed, and that from first to last it has been merely a matter of assumption.

Upon the subject of citizenship, section 6 provides that "every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law or treaty, * * * is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens."

It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes subject to the laws of the State or

Territory in which he resides. As a matter of constitutional law, an Indian appears to be entitled to the benefit of and to be subject to the laws of the State in which he resides the moment he becomes a citizen of the United States. By virtue of the Fourteenth Amendment a citizen of the United States becomes, by residence therein, a citizen of the State, and entitled to all the rights, privileges, and immunities of other citizens of the State and to the equal protection of its laws. (*The Slaughter House cases*, 16 Wall., 36.)

The view that allottees, under the act of 1887, do not become citizens of the United States and subject to the laws of the State in which they reside until their allotment is completed by the issuance of the final patent, puts this act in accord with the treaty of July 28, 1862, referred to in the original brief (p. 14 et seq.) That treaty, as there stated, provided for the division of the Kickapoos into two classes—those desiring lands in severalty and those preferring to continue holding their lands in common; the assignment of lands in severalty to the first class, such assignments to be represented by "certificates," issued by the Commissioner of Indian Affairs, specifying the names of the individuals to whom they had been made and stating that the tracts so assigned had been "set apart" for the perpetual and exclusive use and benefit of such assignees and their heirs, such tracts to be exempt from levy, taxation, and sale, and assignable in fee only to the United States or members of the Kickapoo tribe, under the supervision of the Secretary of the Interior; and finally, whenever the President should become satisfied that any of such

allottees who were adults and heads of families had become sufficiently intelligent and prudent to control their affairs and interests, *the conveyance of the lands assigned to them by patent in fee simple*, with the power of alienation, at the same time setting apart and placing to their credit, severally, their proportion of the trust funds of the tribe held by the United States, etc.; it being provided that "*on such patent being issued*, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe and shall become citizens of the United States, and *thereafter* the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

In *United States* v. *Rickert* (188 U. S., 432, 436) the court points out that the word "patents" was improperly used in section 5 of the act of 1887 to describe the instrument to be issued by the Secretary of the Interior when the allotments provided to be made are approved, since the legal title to the lands allotted remained in the United States and would not be extinguished until the conveyance in fee at the end of the period of trust. In other words, the first patent (so called), referred to in the act of 1887, was merely the equivalent of the "certificate" which, under the treaty of 1862, the Commissioner of Indian Affairs was to issue upon the assignment of lands in severalty to the Kickapoos, and in both cases the patent, properly speaking, was the instrument by which the fee in the lands allotted was to be conveyed.

It appears from an examination of the acts of Congress that in providing for the allotment of lands in severalty among the various tribes of Indians residing upon reservations located in the *States*, Congress has followed the policy indicated in the act of 1887 of coupling with the allotment a reservation of the title in the United States for a period of twenty-five years, or longer, at the discretion of the President. As to those tribes located in the Indian Territory, however, a somewhat different policy has been pursued, suggested, it appears, by the fact that Congress wished to erect that Territory into a State.

Thus the act of March 3, 1893 (27 Stat., 612), provides:

> SEC. 15. The consent of the United States is hereby given to the allotment of lands in severalty, not exceeding one hundred and sixty acres, to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; *and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States*, and the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; *and upon the allotment of the lands held by said tribes, respectively, the reversionary interest of the United States therein shall be relinquished and shall cease.*

Section 16 provided for the appointment of the "Dawes Commission," and for extinguishing the national or tribal title to any lands within the Indian Territory, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of each nation or tribe, with a view to the ultimate creation of a State or States of the Union embracing the lands within that Territory.

Pursuant to this authority, an agreement (ratified and approved by the act of Congress of June 28, 1898, 30 Stat., 495) was made with the Choctaw and Chickasaw nations by which it was provided that those tribes should allot their lands among their members; that from the lands allotted the allottee should select a homestead of 160 acres, which should be inalienable for twenty-one years from the date of patent; the remainder of the lands to be alienable, but no allottee to lease his land for a longer period than five years. Upon the completion of the allotments patents were to be executed and delivered to the allottees, the acceptance of which would operate as an assent on their part to the arrangement. It was also provided "that the Choctaws and Chickasaws, *when their tribal governments cease*, shall become possessed of all the rights and privileges of citizens of the United States."

That act also ratified an agreement with the Creek Indians, providing for the allotment to each citizen of that nation of 160 acres of land, to be confirmed by a patent from the principal chief of the nation. It was

also provided that "the United States agrees to maintain strict laws in the territory of said nation against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality;" and that "all citizens of said nation, *when the tribal government shall cease*, shall become possessed of all the rights and privileges of citizens of the United States."

The act of July 1, 1898 (30 Stat., 567), ratified an agreement with the Seminole Indians for the allotment of lands in severalty among the members of that nation. It provided that when the tribal government should cease a deed in severalty should be delivered to each allottee, operating as a relinquishment of right and guaranty of title by the United States, and as a relinquishment of interest by the allottee in other tribal lands. A tract of 40 acres for each allottee was made inalienable and nontaxable as a homestead in perpetuity.

By this agreement the United States agreed to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind, but nothing was said upon the subject of citizenship.

Later acts of Congress have changed or restricted, to a greater or less degree, the power of the Indians above mentioned to alienate or encumber their allotments; but the provisions of the prior acts and agreements as to the nature of the title received by the allottee and upon the subject of citizenship have not been altered.

It will be observed that all of this legislation contemplates the continuance of the relation of guardian and ward between the United States and the tribes in the Indian Territory, despite the fact that the title of the allottees to their lands has been guaranteed and confirmed by the United States. It will also be observed that citizenship is deferred until the tribal governments shall cease.

This being the condition of the Indians in the Indian Territory, although possessing the legal title to their allotments, it would certainly seem that Congress intended to maintain its attitude of guardian and protector over the Indians in the States while the title to their allotments was held in trust by the United States, and consequently that citizenship and subjection to State legislation, if inconsistent with the maintenance of its guardianship, was not intended to be conferred until the expiration of the trust period.

An interesting and significant fact bearing upon the power of Congress to protect the Indians in the Indian Territory after it becomes a State, is presented by the Congressional Record of January 12, 1905. On that day Senator Gallinger laid before the Senate a large number of petitions from the Indian Territory, apparently from both whites and Indians, praying, he said, "that in our legislation the provisions of our treaties with the Indians shall be observed and continued, so that, so far as the Indian Territory is concerned, they shall have prohibition in the future as they have had

in the past." One of these petitions, signed by 76 Choctaw Indians, read as follows:

> We, the undersigned Choctaw Indians, in attendance at a big meeting at Mount Zion, Choctaw Nation, do most earnestly petition your honorable body to make such provision in the approaching statehood bill as is necessary to prohibit the introduction and sale of intoxicating drinks within our bounds, in accordance with the agreement made with the several tribes before allotment.

Will it be said that Congress could not make such provision in the statehood bill for the protection of these Indians, because of the fact that, upon the admission of the new State, they would become citizens of the United States and subject to the laws of the State?

Line of argument made in original brief still adhered to.

While urging the view that the act of 1887, properly construed, did not intend to make Indians receiving allotments thereunder citizens of the United States and subject to the laws of the State in which they reside until they had received the final patent for their allotments, I still contend that it is within the power of Congress, even if those consequences attached upon the receipt of the first patent (so called), to reserve the power to regulate trade and commerce with him.

Whatever the opposing considerations may be, I do not think the court would be justified in holding that

such allottees are citizens of the United States and subject to the laws of the State if that would mean the withdrawal of them absolutely from the protection of Congress. I see no necessity for any such consequence. It is contended that an Indian can not be a citizen of the United States and a ward of the Government at one and the same time, and yet, in the same breath, it is admitted that these allottees are still wards of the Government in respect of their property. It is anomalous, it is said, to think of a citizen of the United States who is a ward of the Government; but in the practical administration of government there are many anomalies, and the situation of the Indian from the beginning has been anomalous. It is anomalous to think of the United States acting as guardian or trustee for any citizen or class of citizens, and yet, admittedly, that is its relation to these allottees in respect of their property.

It is manifest that Congress, in the act of 1887, imposed the limitations which it did upon allotments made in pursuance of that act, not simply for the purpose of protecting the property of the Indians, but to protect the Indians by protecting their property. In other words, this feature of the act distinctly shows that Congress had not renounced its guardianship *over his person*—that he was still to be regarded as a ward of the Government. Later acts, referred to in the original brief, including the act of 1897, are but further illustrations of that fact.

Ordinarily a citizen of the United States must look, in the first instance at least, to the State in which he

resides for the protection of his rights of person and property; but it is to be observed that he may occupy other relations to the General Government than that of citizenship, in which event the duty to protect him will devolve primarily upon the United States. The authority of the United States to legislate for the protection of its officers and agents, though citizens of the United States and of the State in which they reside, can not be questioned. And if it can legislate for the protection of its officers and agents, why can not it legislate for the protection of its wards?

In *Ohio* v. *Thomas* (173 U. S., 276) this court held that a State had no authority to interfere with the administration by Congress of a national soldiers' home located within its limits; nor, in the exercise of its police power, to regulate or prohibit the use of any article of food which had been approved by the management of the home under the authority of Congress. This conclusion was not based upon the ground that Congress had exclusive jurisdiction over the place where the home was located, because such was not the fact, the place being within the jurisdiction of the State.

The necessary inference to be drawn from this decision is that the inmates of a soldiers' home, although generally within the jurisdiction and protection of the State, are nevertheless subject to the regulation and control of Congress. And it inevitably follows, that if the States can not regulate or prohibit the purchase and use for such inmates of articles of food or drink,

Congress may do so; and hence it can pass a law forbidding the sale of liquor to them. If it may do this, simply because of the special interest it has in their welfare, why may it not, for like reasons, legislate for the protection of its Indian wards, who have received allotments of land in severalty under the act of 1887, although like the old soldiers, they may be citizens of the United States and subject generally to the laws of the State in which they reside?

But we may go a step further. Why are allotments held in trust for twenty-five years or longer; what is the legal meaning and effect of such a trust? Not only, in general, to create a tentative and probationary status, which would enable Congress to observe during a sufficient period, and determine, whether, in fact, pursuant to our policy and duties toward the Indian, he can walk alone and his property rights and personal destiny be committed to his own untrammeled guidance; but also to withdraw the experimental gift, if necessary. That is to say, if results should show, in the judgment of the legislature, that it is disastrous or unwise for themselves or the people at large, to place such Indians in this situation, then the nature of this trust relation would enable Congress to reestablish the *status quo ante*, and, so far as the rights of settlers and third parties had not attached and vested, renew completely the tribal relation and turn the Indians and their allotments back into a reservation. This is merely another way of saying that either allottees do

not become citizens of the United States and subject to State legislation until the final patent has issued, or that they are endowed with a qualified citizenship only, and are not removed entirely from the protection and control of the General Government.

HENRY M. HOYT,
Solicitor-General.

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SUPREME COURT OF THE UNITED STATES.

Office Supreme Court U. S.
FILED
NOV 28 1904
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1904.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF.
NO. 14, ORIGINAL.

RETURN TO RULE TO SHOW CAUSE, ETC.

Supreme Court of the United States.

No. 14, Original. October term, 1904.

EX PARTE. IN THE MATTER OF ALBERT HEFF, PETITIONER.

On consideration of the petition of Albert Heff.

It is now here ordered by the court that cause be shown by W. H. Mackey, United States marshal in and for the district of Kansas, and the keeper of the county jail of Shawnee County, Kansas, before this court, at the city of Washington, on Monday, November 28th, 1904, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of habeas corpus should not be awarded as prayed.

November 7, 1904.

A true copy. Test:

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Indorsed): Supreme Court of the United States. October term, 1904. Term No. 14, original. Order. Filed Nov. 7, 1904.

In the Supreme Court of the United States.

No. 14, Original. October term, 1904.

EX PARTE. IN RE ALBERT HEFF, PETITIONER.

The respondents, William H. Mackey, jr., United States marshal in and for the district of Kansas, and A. T. Lucas, keeper of the county jail of Shawnee County, Kansas, for their return to the order of this court under date of November 7th, 1904, to show cause why a writ of habeas corpus should not be awarded as prayed for by the petitioner, say:

That the petitioner came into their custody and was held by them under the authority of the judgment and order set forth in the petition for a writ of habeas corpus herein filed; and

That on the 10th day of November, 1904, the said petitioner having executed and filed a bond conditioned according to law in the penal sum

of one thousand dollars ($1,000), duly approved by the district judge for the district of Kansas, in pursuance of the order of this court, issued on November 7th, 1904, these respondents discharged the said petitioner from their custody.

Whereupon these respondents say that for the reasons above set forth no writ of habeas corpus should be awarded by this court.

WILLIAM H. MACKEY, Jr.,
United States Marshal for the District of Kansas.
A. T. LUCAS,
Keeper of the County Jail of Shawnee Co., Kansas.

STATE OF KANSAS, *County of Shawnee, ss:*

William H. Mackey, jr., United States marshal for the district of Kansas, and A. T. Lucas, keeper of the county jail of Shawnee County, Kansas, being duly sworn, on their oaths state that they have read the foregoing return and that the allegations therein contained are true.

WILLIAM H. MACKEY, Jr.,
United States Marshal for the District of Kansas.
A. T. LUCAS,
Keeper of the County Jail of Shawnee County, Kansas.

Subscribed and sworn to before me this 23d day of November, 1904.
[SEAL.] GEO. F. SHARITT, *Clerk.*

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FILE COPY.

FILED
NOV 28 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF. NO. 14, ORIGINAL.

RETURN TO ORDER OF COURT DIRECTING ADMISSION OF PETITIONER TO BAIL.

Supreme Court of the United States.

No. 14, Original. October term, 1904.

EX PARTE. IN THE MATTER OF ALBERT HEFF, PETITIONER.

On consideration of the motion for leave to file a petition for a writ of habeas corpus herein and to admit the petitioner to bail pending the hearing.

It is now here ordered by the court that leave be, and the same is hereby, granted to file said petition and that petitioner be admitted to bail on filing a bond conditioned according to law in the penal sum of one thousand dollars, to be approved by the district judge for the district of Kansas.

November 7, 1904.

A true copy. Test:

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Indorsed:) Supreme Court of the United States. October term, 1904. Term No. 14, original. Order. Filed Nov. 7th, 1904.

In the Supreme Court of the United States.

No. 14, Original. October term, 1904.

EX PARTE. IN THE MATTER OF ALBERT HEFF, PETITIONER.

Pursuant to the foregoing order, the petitioner, Albert Heff, having on the 10th day of November, 1904, filed in the office of the clerk of the

United States district court for the district of Kansas, a bond conditioned according to law in the penal sum of one thousand dollars ($1,000), duly approved by the district judge for the district of Kansas, the said Albert Heff was released from custody according to the command of the said order.

WILLIAM H. MACKEY, Jr.,
United States Marshal for the District of Kansas.

A. T. LUCAS,
Keeper of the County Jail of Shawnee County, Kansas.

Subscribed and sworn to before me this 23d day of November, 1904.

[SEAL.]

GEO. F. SHARITT, *Clerk.*

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